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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Amador)

THE PEOPLE,

Plaintiff and Respondent,

v.

DARNELL EDWIN ERBY,

Defendant and Appellant.

C084992

(Super. Ct. No. 16CR24357)

Defendant Darnell Edwin Erby appeals a judgment entered following a bifurcated jury trial finding him guilty of identity theft (Pen. Code, § 530.5, subd. (a)—count one);¹ forgery (§§ 470, subd. (d), 473, subd. (a)—count two); and felony receiving stolen property (§ 496, subd. (a)—count three). The trial court dismissed the unsubstantiated section 12022.1 enhancements and found true the special allegations that the three counts were committed after receiving one strike (§ 1170.12, subs. (a)-(d)) and that defendant

¹ Undesignated statutory references are to the Penal Code.

had four prior prison commitments (§ 667, subds. (b)-(i)). The court reduced count three to a misdemeanor and sentenced defendant to 180 days in jail to be served concurrently with his aggregate prison term of nine years and four months. Defendant contends the trial court erred in failing to stay his sentence on count three pursuant to section 654.

We disagree.

I. BACKGROUND

A. The People's Case

Codefendant Jamie Schoppe testified as part of her plea deal. Schoppe was employed as a loan processor for Capital Premier Lending, which paid her on a per transaction basis. When she was let go, she had not been paid for all her closed transactions. On her way out on her last day, she took a binder of checks from another business in the complex where she had worked. The checks were for business accounts belonging to entities called Terranova Realty and X-Terra Enterprises. Schoppe assumed Terranova Realty was the broker she had been working for. She took the checks because she wanted to make sure she would get paid. Neither Schoppe, nor defendant were actually employed by Terranova. Schoppe put the checks in her backpack and did not write on any of them. Schoppe did not write checks to defendant from Terranova Realty or X-Terra Enterprises.

Schoppe had the checks in her backpack in her car on January 16th when she was arrested. However, she did not take the checks with her to jail, and her backpack went to her companion, Danielle Lokey, who knew about the checks. There were no plans to fill the checks out. Defendant obtained control of the backpack, including the checks, from Lokey so he could return them to Schoppe. Several days after Schoppe's January 17th or 18th release from jail, Schoppe met up with defendant to retrieve her backpack and other personal belongings, which were in his car. A couple of days later, Schoppe reviewed the checks and noticed that several had been filled out for payment to multiple individuals, including defendant. Schoppe never attempted to cash any checks because her former

boss told her he knew about the stolen checks. Schoppe told defendant her former boss knew she stole the checks and that one had been cashed. Defendant admitted he cashed one of them.

Officer Brewer testified to contacting defendant and Schoppe in a parked car on January 25, 2016. A search of the car revealed numerous checks from Terranova Realty and X-Terra Enterprises. Some of these were blank and some were made out to defendant, Schoppe, and at least one other person. Scans of these checks were admitted into evidence. Also admitted were scans of a check made out to and endorsed by defendant that was charged against the underlying account on January 19, 2016.

The victim testified she discovered the theft of her business checks in January after an unauthorized check was cashed. Of the 19 checks missing, only one had been cashed. Neither Schoppe nor defendant worked for her.

B. The Defense

Defendant testified in narrative form that he was with Schoppe when she was arrested. Lokey told defendant that Schoppe had written him a check to get his car fixed, so he cashed it. After Schoppe got out of jail, she contacted defendant and asked for her personal belongings. Defendant learned that Lokey had Schoppe's things and had written him the check. Defendant got Schoppe's things from Lokey and met up with Schoppe, who asked for a ride to her car. Schoppe said she would write him a few checks, since he already cashed one, so that he could help her get her car out of impound. Defendant believed they were Schoppe's checks. They spent several days trying to get defendant's car fixed. Then, on January 23, Schoppe told him the checks were stolen, and that she had asked him to cash one to see if they would work. They argued, and he told her to throw them all away but she refused. He denied ever knowing anything was stolen.

On cross-examination, the People impeached defendant's statement that he doesn't "do stolen shit" with two prior convictions for burglary, one prior passing of a fraudulent check, and one conviction for possessing a stolen vehicle. Defendant admitted lying to

Officer Brewer after his arrest. He also made several incriminating statements to his wife while incarcerated.

C. Sentencing

The presentence probation report did not address the applicability of section 654. At the sentencing hearing, defendant's counsel argued counts two and three (forgery and receiving stolen property) should be stayed pursuant to section 654 because they were subsumed in the identity theft conviction given that the property received and forged were the checks that were the subject of that identity theft conviction. The trial court did not expressly rule on the applicability of section 654, but impliedly did so when it sentenced him to 180 days in jail on count three to be served concurrently with his aggregate prison term of nine years and four months, which included a consecutive term for count two. Defendant timely appealed.

II. DISCUSSION

On appeal, defendant challenges only the applicability of section 654 to count three. He argues "section 654 requires the punishment for receiving stolen property be stayed because the conviction is based on possession of the same checks underlying the forgery conviction." (Emphasis omitted.) We are not persuaded.

As the Supreme Court explained in *People v. Harrison* (1989) 48 Cal.3d 321, 335: "It is well settled that section 654 protects against multiple punishment, not multiple conviction. [Citation.] The statute itself literally applies only where such punishment arises out of multiple statutory violations produced by the 'same act or omission.' [Citation.] However, because the statute is intended to ensure that defendant is punished 'commensurate with his culpability' [citation], its protection has been extended to cases in which there are several offenses committed during 'a course of conduct deemed to be indivisible in time.' [Citation.]

"It is defendant's intent and objective, not the temporal proximity of his offenses, which determine whether the transaction is indivisible. [Citations.] We have

traditionally observed that if all of the offenses were merely incidental to, or were the means of accomplishing or facilitating one objective, defendant may be found to have harbored a single intent and therefore may be punished only once. (*Neal v. State of California* (1960) 55 Cal.2d 11, 19.)

“If, on the other hand, defendant harbored ‘multiple criminal objectives,’ which were independent of and not merely incidental to each other, he may be punished for each statutory violation committed in pursuit of each objective, ‘even though the violations shared common acts or were parts of an otherwise indivisible course of conduct.’ [Citation.]” (*People v. Harrison, supra*, 48 Cal.3d at p. 335.)

Defendant concedes, as he must, that courts have rejected applying section 654 to preclude punishment for multiple crimes committed with the same objective over a period of time. (*People v. Andra* (2007) 156 Cal.App.4th 638, 641-642 [section 654 does not bar punishment for identify theft to open a checking account in which stolen checks were deposited weeks later]; *People v. Neder* (1971) 16 Cal.App.3d 846, 854 [refusing to apply section 654 to punishment for three separate purchases made on the same day with the same credit card].) He nonetheless posits that *People v. Kenefick* (2009) 170 Cal.App.4th 114 supports the application of section 654 to preclude punishment for actions that were preliminary steps in a plan to steal money. He argues that because he “received all the checks and forged three checks at the same time pursuant to a single objective: to obtain stolen funds,” that section 654 applies to preclude his punishment for receiving stolen property.

Not only is this argument factually flawed because there is no evidence proving that defendant forged the checks at the same time that he received them, it ignores that the trial court could have reasonably determined defendant’s receipt of the stolen checks was with the separate intent and objective to safeguard them for return to Schoppe and not to obtain money from the victim. This implied determination must be upheld if supported by substantial evidence. (*People v. Brents* (2012) 53 Cal.4th 599, 618 [“A trial

court's express or implied determination that two crimes were separate, involving separate objectives, must be upheld on appeal if supported by substantial evidence"].)

Here, it is undisputed that Schoppe stole the checks to assure she would be paid after her dismissal. While Lokey knew about the checks, they did not have plans to fill them out. Schoppe relinquished control of the backpack containing the checks to Lokey because she was being arrested. Defendant obtained control of the backpack, including the checks, from Lokey so he could return them to Schoppe. Thus, the trial court could have reasonably inferred defendant received the stolen checks, not for the purpose of obtaining money from the victim, but to safeguard them for return to Schoppe.

There is also evidence that defendant formed a separate intent to forge at least one of the stolen checks to obtain money from the victim's account. After defendant returned Schoppe's backpack, she noticed some of the checks were made out to individuals, including defendant. Further, a check made out to and endorsed by defendant cleared the bank on January 19, 2016. Thus, there was substantial evidence from which the trial court could have reasonably inferred defendant had separate intents and objectives in counts two and three.² (See *People v. Rowland* (1971) 21 Cal.App.3d 371, 375 [section 654 did not bar punishment for receiving a stolen wallet including credit cards and then keeping those credit cards with the intent to use or sell them].)

² Given that there were separate intents and objectives, we need not resolve the parties' dispute concerning the significance of the dates on the checks.

III. DISPOSITION

The judgment is affirmed.

/S/

RENNER, J.

We concur:

/S/

HULL, Acting P. J.

/S/

ROBIE, J.